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Nos. 04-229 and 04-228

In The
Supreme Court of the United States

MILLE LACS COUNTY, MINNESOTA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

FIRST NATIONAL BANK OF MILACA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Minnesota has a strong interest in seeing that the dispute over the boundaries of the Mille Lacs Indian Reservation is judicially resolved. Therefore, it urges the Court to grant certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Minnesota agrees with Petitioners, Mille Lacs County (County) and First National Bank (Bank), that the Mille Lacs Indian Reservation consists of approximately 4,000 acres of trust land (land held in trust by the federal government for the Mille Lacs Band or its members). The Mille Lacs Band, with the agreement of the United States Department of Interior, asserts that the reservation includes the approximately 61,000 acres that composed the original reservation established by the 1855 Treaty between the United States and the Chippewa.

The dispute over the Mille Lacs reservation boundaries has unhappily pitted the State and its subdivision Mille Lacs County, against the Mille Lacs Band of Ojibwe for the last fifteen years. In the Lake Mille Lacs area, it has prompted consternation in newspaper editorials and intense disagreements between friends and neighbors. Co. Pet. App. 171a, 188a and 201a. Only the federal courts have the ability to end the quarreling among neighbors and determine whether the boundaries of the reservation, as set out in the 1855 treaty, continue to exist or not. In addition to ending contention between Band members and non-Band members living in the area, the State, for its own interest, would like the reservation boundaries issue resolved. The disagreement affects the State's ability to

implement its responsibilities under state and federal law in the disputed reservation area.

The State's inability to fully implement its laws because of the boundary dispute can be seen in two examples resulting from the management of environmental laws by the U.S. Environmental Protection Agency ("EPA"). The first is the "treatment as a state" process, while the second is the "state program authorization" process.

Under the treatment as a state provisions of the federal Water Pollution Control Act and the Safe Drinking Water Act, the Mille Lacs Band has asked the EPA for authority to apply tribal environmental laws in the disputed reservation area in lieu of EPA applying federal law. Although the State opposed the Band's application because of its reservation boundary aspects, the fact is that the treatment as a state administrative process of comment and an on-the-record review of EPA's decision does not allow for adequate presentation of the complex, historical evidence involved in reservation boundary disputes.

Likewise under the parallel state program authorization process, where a state asks EPA for approval to apply state environmental laws in lieu of EPA applying federal environmental laws, the State has been reluctant to apply for state program approval in the disputed Mille Lacs Reservation area. As with the treatment as a state process, the administrative program approval process is not designed to allow for a full presentation of the complex evidence necessary to analyze and interpret Indian treaties and Congressional enactments.

The Mille Lacs Reservation boundary dispute is an issue in both administrative processes, but evades adequate

adjudication. The proper forum for such adjudication is the federal courts. By granting *certiorari*, this Court can consider the arguments of the parties and then determine whether a controversy exists within the meaning of Article III, § 2 of the U.S. Constitution and 28 U.S.C. § 2201, and if so, return the case to the District Court for a trial on the merits.

For these reasons, the State of Minnesota files this brief in support of the Petition by the County and the Bank.

REASONS FOR GRANTING THE PETITION

I. The Notice and Comment Process For 'Treatment As A State' – Under Which The Mille Lacs Band Has Sought EPA Approval To Apply Tribal Environmental Laws To All Persons Within The Disputed Reservation – Is Not An Appropriate Forum For Resolving Complex Reservation Boundary Disputes.

Under the Water Pollution Control Act, the Safe Drinking Water Act, and the Clean Air Act, Indian tribes can apply to EPA for 'treatment as a state' to enforce tribal environmental laws in lieu of EPA applying federal environmental laws. *See* 33 U.S.C. § 1377(e) (2000) (Water Pollution Control Act); 42 U.S.C. § 300h-1(e) (2000) (Safe Drinking Water Act); and 42 U.S.C. § 7601(d) (2000) (Clean Air Act). Under these statutes and their implementing regulations, like a state, a tribe can apply to establish water quality standards, issue and enforce National Pollutant Discharge System (NPDES) permits, issue and enforce permits to dredge and fill in public

waters, regulate underground injection control systems, regulate management of sewage sludge, control non-point source pollution, enforce drinking water standards, and regulate various air quality sources. *See* 40 C.F.R. § 181.8 (2003) (water quality standards); 40 C.F.R. §§ 123.31-.32 (2003) (NPDES permits); 40 C.F.R. §§ 233.60-.61 (2003) (dredge and fill permits); 40 C.F.R. §§ 145.52-.53 (2003) (regulate septic systems); 40 C.F.R. §§ 501.22-.23 (2003) (regulate the management of sewage sludge); 40 C.F.R. § 130.6(d) and § 130.15 (2003) (control non-point source pollution); 40 C.F.R. §§ 142.72 (2003) (enforce drinking water standards); and 40 C.F.R. §§ 49.6-.7 (2003) (operate Clean Air Act programs).

To grant treatment as a state, EPA must find that the tribe has both jurisdiction over the geographic area for which it is applying as well as authority to enforce its laws over all persons within the area for which the tribe is applying for program authorization.[1]

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[1] The Water Pollution Control Act requires a showing that the functions to be exercised by the tribe pertain to management and protection of water resources that are "held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (2000). The Safe Drinking Water Act requires a showing that "the functions to be exercised by the Indian tribe are within the area of the Tribal Government's jurisdiction." 42 U.S.C. § 300j-11(b)(1) (2000). EPA has interpreted these two statutes to require a showing of tribal jurisdiction over both the geographic area and the persons within the area for which the tribe is applying for treatment as a state. *See, e.g.*, 56 Fed. Reg. 64,876, 64,877-64,882 (1991) (interpreting the Clean Water Act requirements) and 53 Fed. Reg. 37,396, 37,399-37,400 (1988) (interpreting the Safe Drinking Water Act requirements.) The Clean Air Act requires a showing that "the functions to be exercised by the Indian tribe pertain to the management and protection of air

(Continued on following page)

Upon receipt of a tribe's application, EPA notifies the state and the public of the tribe's application and provides 30 to 45 days, depending on the particular EPA program, to comment on the jurisdictional aspects of the tribe's application, including any claim that the area for which the tribe is applying is not within the boundaries of the tribe's reservation.[2] *See*, 40 C.F.R. § 131.8(c) (2003) (establishment of water quality standards); 40 C.F.R. § 123.61(a) (2003) (NPDES permits); 40 C.F.R. § 233.15(e) (2003) (dredge and fill permits); 40 C.F.R. § 501.31 (sewage sludge management); 40 C.F.R. § 145.31 (2003) (regulation of septic system systems); 40 C.F.R. § 142.13 (2003) (enforcement of drinking water standards); 40 C.F.R. § 130.15 (2003) (nonpoint source management); and 40 C.F.R. § 49.9 (2003) (air quality programs).

When EPA makes a jurisdictional determination on a tribe's application for one EPA program, it will ordinarily

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resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B) (2000). Although a tribe must show geographic jurisdiction, one court has held that the Clean Air Act constitutes an express delegation of authority by Congress to Indian tribes to regulate air resources within an Indian reservation. *See Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied by Michigan v. E.P.A.*, 121 S.Ct. 1600 (2001).

[2] For applications submitted before 1994, EPA had a separate prequalification process for treatment as a state. Tribes that obtained treatment as a state approval then applied for specific program approval. In 1994, EPA merged the treatment as a state determination into the program approval process so that a tribe now only submits one application. EPA also changed its terminology from treatment as a state to treatment of a tribe "in a manner similar to that in which it treats a State." *See* 59 Fed. Reg. 64,339 (1994). EPA recognized, however, that since the statutes use the term treatment as a state, use of that term may need to continue.

make the same determination for all other programs. *See* 59 Fed. Reg. 64,339, 64,340 (1994). With respect to the boundaries of a tribe's reservation, EPA has made it clear that once it decides a reservation boundary in one program application, it will not alter its position in a subsequent program application, unless there is significant new factual or legal information. *Id.*

Because of EPA's position on reservation boundary determinations, the first application of the Mille Lacs Band under the treatment as a state process was important to the State. The Mille Lacs Band first applied for treatment as a state in 1989 for the Underground Injection Control Program, involving regulation of septic tanks used to store sewage and some types of industrial waste. *See* 40 C.F.R. §§ 145.52-.53 (2003). The Band applied to regulate septic systems in the entire 1855 Treaty reservation area and asserted in its application that it had authority to regulate all persons, both Band members and non-members, within the disputed reservation area. The Minnesota Pollution Control Agency ("MPCA") opposed the Band's application, arguing in comments submitted to EPA that the boundaries of the 1855 reservation no longer existed.

In 1996, EPA approved the Band's application for treatment as a state for the Underground Injection Control Program. EPA found that the Mille Lacs Indian Reservation included the 60,000 acre reservation established under the 1855 Treaty. In response, the MPCA submitted additional comments to EPA, as did Mille Lacs County, Isle Harbor Township, and the City of Waukon (all located within the disputed reservation), and requested that EPA reconsider its decision. In 1998, in lieu of further proceedings, the MPCA, the Band, and EPA entered into a

Memorandum of Understanding (MOU), allowing EPA to continue to operate the federal program in the disputed area, with advice from both MPCA and the Band. The MOU is, however, only a temporary solution since it can be terminated on 30 days notice.

The reservation boundary dispute continues to be a real issue because of another Band application for treatment as a state in 1992, this time for the Non-Point Source Management Program under the Water Pollution Control Act. In that application, the Band again asserted that the reservation boundary was the 1855 Treaty boundary and that it had jurisdiction over all Band and non-Band members within this area. The MPCA again opposed the Band's application commenting to EPA that the boundaries of the original Mille Lacs Reservation no longer existed. EPA has not yet made a decision on the Band's application.

When reservation boundaries are in dispute, as they are with respect to the Mille Lacs Reservation, an administrative forum such as the treatment as a state process with a 30-day comment period is ill-suited to deciding issues as complex as the boundaries of an Indian reservation. Determining reservation boundaries involves interpretation of Indian treaties, federal statutes, and a broad range of historical documents, as well as extensive discovery and use of expert witnesses. These are tools not available to the parties in a 30-day comment period. In addition, any review of EPA's decision would likely be an on-the-record review, without the opportunity to further develop the issue on appeal. *See State of Montana v. E.P.A.*, 941 F. Supp. 945, 956 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S.Ct. 275 (1998) (district court noted that review was on the record to

determine whether EPA's decision to grant treatment as a state to the tribe was arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law); *Wisconsin v. E.P.A.*, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied,* 122 S.Ct. 2347 (2002) (holding that EPA's grant of treatment as a state to the tribe was not arbitrary, unreasonable or contrary to law). Allowing the Mille Lacs boundary dispute to be resolved in federal court would permit this controversy to be decided in a forum capable of addressing the complexity of the issue.

II. The Unresolved Boundary Dispute Affects Minnesota's Ability To Obtain State Program Authorization From EPA And, Thus, To Fully Implement Its Environmental Laws Consistently Within The Disputed Area.

EPA's position on the Mille Lacs reservation boundary impacts the State's ability to receive state program authorization from EPA to operate state environmental programs in lieu of EPA enforcing federal environmental laws in Minnesota. State program authorization would allow Minnesota to consistently apply its environmental laws within the State.

Under most federal environmental statutes, a state can apply to EPA for approval of its state program to operate in lieu of EPA implementing federal environmental laws in the state. *See, e.g.,* 40 C.F.R. § 123 (2003) (state program application requirements for the NPDES permit program under the Water Pollution Control Act). To receive approval, a state must show that it has authority to regulate under each program applied for, and that its environmental laws are at least as stringent as federal laws. *See, e.g.,* 40 C.F.R. § 123.21, § 123.23, and § 125

(2003) (NPDES permit program). Minnesota has an extensive set of environmental laws regulating air, land, and water within the state that are administered by MPCA. *See* Minn. Stat. chs. 114C-116I (2002) and Minn. R. chs. 7000-7190 (2003). Showing that Minnesota's laws are as stringent as federal environmental laws is rarely a problem since Minnesota's environmental laws are often more stringent than federal laws. If EPA approves the state program, the state can apply its own environmental laws in lieu of EPA applying federal laws. Minnesota has received federal delegation for most programs under the major environmental statutes. This allows Minnesota to assure consistent enforcement of similar environmental protection standards throughout the state.

With respect to Indian reservations, EPA has taken the position that it will not grant program approval for a state to apply its laws on Indian reservations unless the state can show that it has jurisdiction over the entire reservation. *See, e.g.,* 58 Fed. Reg. 67,966, 67,978 (1993) (commenting on the final rule for the NPDES permit program, water quality certification program, and the sewage sludge management program); *see also* Memorandum from Dougherty, Cynthia C., Permits Division, to EPA Water Management Division Directors, *Guidance on EPA's NPDES and Sludge Management Permit Procedures on Federal Indian Reservations* 1 n.1 (Nov. 16, 1993) (where EPA states that although its regulations contemplate that a state may be able to demonstrate authority on Indian reservations, "the threshold for such a demonstration is very high, and, absent explicit Congressional authorization, it is unlikely that EPA would authorize a State to do so."). EPA considers the Mille Lacs Reservation to be the 60,000 acre 1855 Treaty reservation, relying on a 1991 opinion of the U.S. Department of the Interior's Office of the Field Solicitor. Co. Pet. App. 185a.

As a result of EPA's position on when it will authorize a state program to operate on an Indian reservation, the question of the size of the Mille Lacs Reservation becomes a critical issue. It is one which the MPCA must address each time it applies to EPA for new program authorization. In order to show that the State has jurisdiction, the MPCA has to prove to EPA that the Mille Lacs Reservation does not include most of the area within the original 1855 Treaty. MPCA's burden is made more difficult by having to prove disputed reservation boundaries within the constraints of a program application and by the fact that EPA's decision on the reservation boundaries would likely be subject to an on-the-record review. *See* 42 U.S.C. § 6976(b) (2000) (providing for review of EPA's decision to deny state program authorization in the court of appeals in accordance with the federal Administrative Procedures Act, 5 U.S.C. pts. 701-706); *see also State of Washington, Dept. of Ecology v. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985) (reviewing EPA's decision to deny the State of Washington's application for hazardous waste program authorization to cover both Indians and non-Indians within Indian reservations in Washington).

Like the treatment as a state process, the state program approval process is not designed to allow for an adequate presentation of the complex, historical evidence intrinsic to an analysis and review of a number of Indian treaties, agreements, and Congressional enactments. Only a federal court can provide a forum adequate to decide a reservation boundary dispute.

Because of the inadequacy of the administrative process to resolve the reservation boundary dispute, the MPCA has reluctantly deferred applying for state program authorization within the disputed Mille Lacs reservation.

Instead, it has included language in its program applications to EPA preserving the State's position on reservation boundaries.[3]

As a consequence of the continuing boundary dispute and the difficulty of resolving it, non-Band members living within the disputed area may be subject to inspections by both EPA for compliance with federal environmental law and by the MPCA for compliance with state environmental law. *See* Co. Pet. App. 185a. Allowing the reservation boundary dispute to be heard and decided in federal court will provide an appropriate forum to resolve this issue.

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[3] For example, in the Underground Storage Tank Program application to EPA in 2000, MPCA included the following language: "This disagreement over the boundary of the Mille Lacs Indian Reservation is not, however, well suited for resolution in an administrative forum, which does not allow for adequate presentation of the complex historical evidence fundamental to an analysis and review of Indian treaty disputes. Thus, the Minnesota Pollution Control Agency (MPCA) will cooperate with EPA and allow EPA to continue to operate the Federal Underground Storage [Tank] Program within the area that the EPA describes as the Mille Lacs Indian Reservation, with the explicit written understanding that the MPCA's cooperation does not constitute a concession that EPA's position on the boundary is correct nor waiver of the state's right in the future to seek resolution of the boundary dispute in an appropriate forum." Also, when it granted law enforcement authority to the Mille Lacs Band concurrent with that of the state, the legislature expressly limited the statute so that it would not affect any dispute regarding boundaries or other matters. Minn. Stat. § 626.90, subd. 7 (2002).

CONCLUSION

For the reasons stated, Minnesota respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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